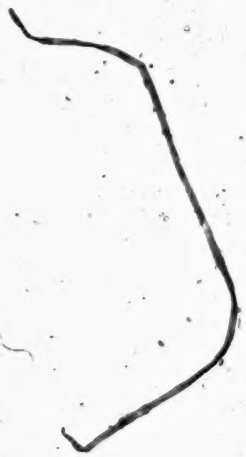

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No. 1174

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

THE ELDER-BEERMAN STORES CORP.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to The United States Court of Appeals for The Sixth Circuit

---

REPLY BRIEF OF PETITIONER

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The Respondent Board's brief attempts to sweep all the questions raised by the petition for certiorari under the rug and thus avoid them by the well known stratagem of claiming that all the issues raised were evidentiary and therefore not ordinarily subject to review here. This clever contention to avoid meeting the issue is not borne out by the record as will be shown below. As part of the same strategy the Board's brief summarily treats the few points it deigns to discuss as if they were really unworthy of attention. We submit that the issues raised are presented on the record and deserve not only the serious

consideration of this Court but require resolution by a decision of this Court on the merits.[1]

QUESTION I.

The Board's brief at page 11 admits that the Board refused to identify Joseph Rutledge and Graham as the "employees" Vice President Stine was alleged to have unlawfully interrogated. Indeed the Board even refused to state the time or place of the alleged interrogations when it overruled petitioner's motion for a bill of particulars. The Board's excuse that Petitioner could have obtained the information from Stine is necessarily without merit since Stine denied the charge. Secondly, such an excuse could have no more validity than any prosecutor's refusal to reveal specifics of a vague charge on the contention that it is unnecessary because the accused knows all the unstated specifics. This of course presumes guilt before trial. Moreover Graham was a supervisor and not an "employee" under the Act; so he could not possibly have been anticipated as being one of the "employees" Stine was alleged to have interrogated. Since Stine as part of his duties talked to hundreds of employees, he would have no way of knowing that the other of the two alleged employees was Joseph Rutledge who worked five miles away from the Apple Street Warehouse, which was the only place mentioned in the Complaint.

The Board admits (B.Br. 12, note 5) its practice of refusing to identify prior to the hearing employees allegedly subjected to unfair labor practices, excusing the practice

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[1] The letter "A" before page numbers in parentheses following a factual statement refers to the pages in the Appendix in the Court of Appeals supporting the statement. "B.Br" before page numbers in parentheses following a statement refers to the pages in the Board's brief in this Court where the statement is found.

on the ground that the refusal is to protect the employees against reprisals. First of all in the present case such refusal could not have been on that ground because Graham had already been discharged, and Joseph Rutledge had voluntarily quit. Besides even in other cases such an excuse cannot justify the practice, anymore than a prosecutor could so justify concealing the identity of non-defendant alleged co-conspirators in a conspiracy case. The possibility of reprisal cannot deprive the accused of his right to know with what he is charged. Protection or relief from possible reprisal must be otherwise provided.

Finally the Board's brief says that Petitioner has not proved that the concealment prejudiced petitioner. Such prejudice is presumed as it is in any other case where the time, place and persons involved in an alleged offense are concealed from the charged party. One is not required to state how the preparation of his defense would have differed had he not been taken by surprise. The petitioner simply never had the opportunity to prepare any defense against the surprise.

In the light of the admitted Board practice, and its most unfair effect on petitioner in this case, this case is an ideal vehicle for this Court to put a stop to such practice.

QUESTION II.

The Board's brief at page 11 admits that the complaint did not allege the April discharge of the five drivers was for protected concerted activities unrelated to unionism in violation of Section 8(a)(1), and that the Board nevertheless so found, but attempts to justify such variance by claiming that the issue was tried. There is no basis for such a claim in the record. The pages of the record cited by the Board (R. 62-63, 55) do not bear out its claim at all, but merely confirm the "slowdown" claim of

petitioner. Nor did petitioner raise such issue in its brief to the Trial Examiner as now claimed by the Board. On the contrary the very employees themselves denied there was any concerted activity at all. Indeed the General Counsel's brief to the Trial Examiner (A 260), itself, also confined the discharge of the five drivers to an alleged violation of Section 8(a)(3), with no contention that any violation of Section 8(a)(1) was involved.

As shown at pages 14 to 16 of the petition, the variance deprived petitioner of a fair trial, and other Circuits have held such a variance violates due process. This important question and conflict in the Circuits surely deserve resolution by this Court.

QUESTION III.

(The ordered reinstatement of Supervisor Graham)

The Board claims this Court has already decided this question adversely to petitioner in *Local No. 207, Association of Bridge Workers* v. *Perko*, 373 U.S. 701, 707, in which this Court held that the National Labor Relations Act had preempted jurisdiction from state courts in a case where an employee, Perko, sued his union for damages for unlawfully causing his discharge.

In *Perko*, Perko was not in fact a supervisor under the Act while here it is agreed that Graham was a supervisor. However, this Court in *Perko* by way of dicta did discuss the hypothetical case "even if it be assumed that Perko was not an employee but was solely a supervisor." In that hypothetical discussion this Court noted by way of analogy that the Fifth Circuit in ordering supervisors reinstated with back pay had held in the two cases mentioned on page 17 of the petition here[2] that "discharge of a super-

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[2] *NLRB* v. *Better Monkey Grip Co.*, 243 F.2d 836 (1957) and *NLRB* v. *Talladega Cotton Factory*, 213 F.2d 209 (1954).

visor for failure effectively to coerce employees into renouncing their union affiliation constitutes a violation of Section 8 (a) (1), because such a discharge would reasonably cause non-supervisory employees to fear that they might meet the same fate if they adhered to the union."

In the case at bar, no such effect on non-supervisory employees was possible because they had no knowledge of Graham's alleged instructions to engage in surveillance. Nevertheless, in its decision after it found that Graham was discharged for refusing to carry out the alleged surveillance instructions, the Board went on to say "We find in the circumstances of this case, that this was unlawful without regard to employee knowledge" (Pet. App. 30). Hence the Board and Court below went far beyond the cited Fifth Circuit cases in ordering Graham's reinstatement with back pay.

In *Perko* this Court gave only a tangential consideration to the cited Fifth Circuit cases in making use of them by way of analogy. It has never given direct consideration to the issue of the very validity of those decisions, and the conflict between them and decisions of the Fourth and Ninth Circuits, in addition to the rationale and raison d'etre of the Taft-Hartley Amendments on the Board's right to order reinstatement of supervisors, or to the practical, ruinous consequences to any employer that could flow from such ordered reinstatement, all as discussed at pages 16 to 18 of the petition here. The case at bar again in this instance presents a perfect vehicle for this Court to end the confusion and clarify the proper interpretation to be given to Taft-Hartley on this issue.

QUESTION IV.

There is no evidentiary conflict on the issues raised by this question, nor has the Board's brief referred to any.

The question accepts the Board's findings as correct. There is no dispute that both supervisor Graham and Joe Rutledge (who was not even in the unit attempted to be organized, but was five miles away), to whom Vice President Stine is alleged to have given surveillance instructions, refused to carry out such instructions, and there is no evidence and no finding that such instructions were ever revealed to any employee. Hence the very important issues raised by petitioner's Question IV and the conflict created in the Circuits, as discussed at pages 18 to 20 of the petition here, are clearly made out by the record.

QUESTION V.

(Discussed at pages 20 and 21 of the Petition)

What the Board's brief calls an evidentiary dispute on this question is really not, but is a question of semantics. The actual conduct of the employees involved is not in dispute. The Board chose to call such conduct concerted activity protected by Section 8(a)(1), certainly a legal conclusion, rather than a "slowdown," a word which petitioner used to characterize the conduct. Petitioner does not wish to engage in a semantics dispute, and is satisfied to have this Court consider the conduct involved itself without any "trigger-word" characterization, and resolve the legal issue.

QUESTION VI.

This question likewise is not based on any evidentiary conflict. It raises an issue based on undisputed facts in the record. There was no evidence whatever, either circumstantial or direct, and the Board in its brief makes no claim to the contrary, that petitioner had any knowledge of union sympathy, activity or membership of any of the

discharged employees referred to in Question VI. Hence the issues raised by petitioner's Question VI, discussed at pages 21 to 23 of the petition here, are plainly supported by the record.

QUESTION VII.

This question does not involve any evidentiary dispute, but does involve a difference between the permissible legal conclusions by the Board and by petitioner to be drawn from the evidence. The question is whether the alleged statements in President Beerman's speech can be legally found to be an offer of reward in violation of Section 8 (a) (1), plainly a legal question. It has never been held that this Court is bound by legal conclusions of the Board or that they are not subject to review here. The importance of the issue raised and the conflict in the Circuits pointed out at pages 23 to 25 of the petition merit this Court's review.

CONCLUSION

The issues raised by the petition being supported by the record, for the reason stated in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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